

KAY KAYSER-MEYRING,
Appellee

v.

BUREAU OF LAND MANAGEMENT,
Respondent

KIRK SHINER
Intervenor/Appellant

IBLA 97-431

Decided March 1, 2000

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer setting aside and remanding a Final Decision of the Area Manager, Glenwood Springs Resource Area, Colorado, Bureau of Land Management, and awarding grazing use to applicant, Kay Kayser-Meyring. CO-07-94-01.

Decision Affirmed.

1. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Hearings--Rules of Practice: Appeals

The Department has provided that an adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 C.F.R. Part 4100. 43 C.F.R. ' 4.478(b). In this manner, the Department has considerably narrowed the scope of review of BLM grazing decisions by an Administrative Law Judge and by this Board.

2. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Hearings--Rules of Practice: Appeals

Where BLM notifies prospective applicants for grazing use and preference that, if leased property is offered as base property to qualify for grazing use, the term of the lease must be for 3 years, as set forth in a BLM state Range Administration

Policy, and an applicant offers base property land leased for less than 3 years, the Administrative Law Judge's decision finding that the applicant failed to qualify for grazing use and that BLM improperly awarded grazing use to the applicant will be affirmed.

APPEARANCES: Clyde A. Faatz, Jr., Esq., Denver, Colorado, for Appellant; Mary C. Hoak, Esq., Fraser, Colorado, for Appellee; Jennifer E. Rigg, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Rocky Mountain Region, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Kirk Shiner d.b.a. Flattops Ranch has appealed from a May 13, 1997, decision of Administrative Law Judge (ALJ) Harvey C. Sweitzer, setting aside a March 25, 1994, Final Decision of the Area Manager, Glenwood Springs Resource Area, Colorado, Bureau of Land Management (BLM), which had awarded him a grazing preference of 575 animal unit months (AUM's), with respect to 4,090 acres of newly!acquired public land in the North King Mountain Allotment (No. 08604), pursuant to section 15 of the Taylor Grazing Act, as amended, 43 U.S.C. ' 315m (1994), and 43 C.F.R. Part 4100 (1994), and, in addition, remanding the case to BLM for issuance of the preference to Kay Kayser!Meyring. 1/ The allotment is situated in T. 1 N., Rs. 84 and 85 W., Sixth Principal Meridian, Routt County, Colorado.

We have evaluated the record in connection with our consideration of a petition to stay filed by Appellant, and determined, based on the standards for granting a stay set forth at 43 C.F.R. ' 4.21, to decide this appeal.

The facts are recited in the ALJ's decision:

In a land exchange completed in 1993, BLM acquired 4,200 acres of land from the Visintainer Sheep Company (Tr. 30-31; Ex. A).

BLM determined that the lands are suitable for grazing and that 600 AUMs of forage are available (Tr. 31, 338-39, 347-48).

The land is designated as a "Section 15" lease property, meaning that it is not part of a grazing district and that its use is governed by section 15 of the Taylor Grazing Act, 43 U.S.C. ' 315(m) (Tr. 61-62).

BLM sent out notice to five surrounding "neighbors," informing them of the availability of the land for grazing and the procedures to apply for the grazing preference for

1/ Shiner had originally intervened in an appeal that Kayser!Meyring had taken from the March 1994 Final Decision to the Hearings Division, Office of Hearings and Appeals (No. CO!07!94!01).

the land (Ex. A; Tr.31-33, 348). All five recipients of the notice applied for the grazing preference (Exs. B, D, V, W, 5; Tr. 34).

The application information specified that "[i]f leased property is offered as base [property], the term of the lease must be for a minimum of three years (five years recommended)."

(Ex. A) This three-year lease term requirement is a State-wide policy for BLM in the State of Colorado and it is designed "to achieve resource objectives by promoting longer term range management." (Tr. 441-42; Ex. 6)

In his grazing application, Mr. Shiner offered as base property two parcels of land, one known as the GM Breeding Farms and one as the Sleepy Hollow Ranch or Hatt Ranch (Exs. D, E; Tr. 236, 498-99, 523). He represented that he was leasing these properties and certified, as required by 43 C.F.R. ' 4110.2-1(c), that these base properties met the requirements of the grazing regulations at 43 C.F.R. ' 4110.2-1 (Ex. D).

However, his application packet did not include copies of the purported leases (Tr. 41, 354-355). BLM Range Conservationist Michael Hayes telephoned Mr. Shiner and requested copies of the leases (Tr. 41, 355). Copies were eventually provided to BLM after the Final Decision had been made (Tr. 41, 56, 355). Mr. Hayes explained that it was not unusual to receive grazing applications which lack supporting documentation or necessary information and that BLM often proceeded to process such applications, relying upon the good faith of the applicants (Tr. 355-56).

Mr. Shiner testified at the hearing in September of 1996 that he had been leasing the Hatt Ranch for three years (Tr. 524). Mr. Shiner's initial lease for the Hatt Ranch was for a term of less than one year (Ex. E). That lease and testimony from the manager of the ranch, Ben Coomer, pinpoint the date when Mr. Shiner began leasing the ranch as April 1, 1994 (Ex. E; Tr. 238-40, 249-51, 254-58), after he filed his grazing application and after the Final Decision was issued.

Mr. Shiner did begin leasing the GM Breeding Farms prior to filing his grazing application. He leased it for the years 1991 through 1994 pursuant to the terms of annual one-year leases (Tr. 504-05, 508). This property is contiguous to the BLM land now known as the North King Mountain Allotment (Tr. 48-50, 499-501). In 1996, Mr. Shiner purchased the GM Breeding Farms (Tr. 501-502, 504).

For assistance in determining to whom the grazing preference should be awarded, Mr. Hayes constructed what he refers

to as a matrix (Tr. 57, 435-36; Ex. I). The matrix is a chart setting forth the various criteria for evaluating conflicting applications for the same grazing preference (Ex. I; Tr. 57, 59-61). The criteria were taken from 43 C.F.R. ' 4130.1-2, with the addition of seven discretionary factors considered "unique to the situation" (Tr. 59-61,75). Each applicant was rated according to a scale under which a higher number means the applicant more positively met the correlative criteria (Tr. 62-72). Mr. Shiner received the highest rating, Mr. Kissinger was rated third, and Mrs. Kayser-Meyring was rated fourth (Ex. I).

Mrs. Kayser-Meyring originally applied for approximately 200 of the 600 available AUMs and indicated her desire to use only the eastern portion of the available land (Ex. B; Tr. 284-85). Prior to issuance of the Final Decision, Mr. Hayes discussed with her the fact that BLM preferred to award the grazing preference to one grazer who would use the entire 600 AUMs throughout the entire acreage (Tr. 284-85, 359-61, 376). She then indicated to Mr. Hayes her desire to use the entire allotment (Tr. 284-85, 360).

In a Proposed Decision dated January 21, 1994, the Area Manager, Mr. Michael Mottice, proposed to divide the 4,200 acres declared available for grazing into two separate allotments, one (later to be known as the Egeria Park Allotment) containing 160 acres, and the North King Mountain Allotment, containing the remaining acreage (Ex. S). He also proposed to reject Mrs. Kayser-Meyring's application for the grazing preference to this land in favor of an award of 575 AUMs of grazing preference in the North King Mountain Allotment to Mr. Shiner and an award of 25 AUMs in the Egeria Park Allotment to Mr. Kissinger (Ex. S).

Mrs. Kayser-Meyring then filed a protest of the Proposed Decision (Ex. R). In her protest she informed BLM that she was applying for the entire 600 AUMs of available grazing preference (Ex. R).

On March 25, 199[4], the Final Decision was issued awarding the grazing preference as set out in the Proposed Decision and rejecting Mrs. Kayser-Meyring's application (Ex. T). Mrs. Kayser-Meyring is the only applicant who appealed the Final Decision and the time for filing an appeal to this tribunal has expired.

(May 13, 1997, Decision at 2-3 (footnote omitted).)

In his statement of reasons (SOR), Appellant challenges the "propriety of ALJ Sweitzer's decision of May 13, 1997, which reversed the award of

the 575 AUMs of grazing preference to Dr. Shiner and ordered that the grazing preference be awarded to Kayser-Meyring." (SOR at 2.) Specifically, Appellant argues that the ALJ failed to apply controlling IBLA precedent and common law; that the ALJ failed to apply the proper standard of review and proper deference in reviewing BLM's decision; and that BLM acted properly and rationally in determining that Dr. Shiner was a qualified applicant who was properly awarded the grazing lease. (SOR at 2-3.)

Initially, BLM concluded that each of the five applicants met the mandatory qualifications under 43 C.F.R. ' 4110.1(a)(1994) to qualify for grazing use, based on their representations that each was engaged in the livestock business, owned or controlled contiguous base property, and was a United States citizen. In its notice to prospective applicants, BLM defined control of base property in terms of a Range Administration Policy which was announced by BLM in a general "Dear Permittee" letter dated September 21, 1990. The letter highlighted for clarification base property leases, stating that "BLM will require a minimum of three years for a base property lease and recommends five years." (Ex. 6 at 1.) Thus, at issue in this appeal is whether, at the time of submitting his application for grazing use in response to the BLM notice and on the date of issuance of the Final Decision awarding the grazing use, Appellant met the mandatory requirements to be considered a qualified applicant. See 43 C.F.R. ' 4110.1(a).

Judge Sweitzer found that he did not. In his May 1997 decision, Judge Sweitzer concluded that BLM improperly awarded the grazing preference to Shiner since he did not "control" base property, as required by 43 C.F.R. ' 4110.1(a). Judge Sweitzer concluded that Shiner did not, at the time of filing his application or at the time of BLM's March 1994 Final Decision, hold the offered land under a minimum 3!year lease, contrary to the Colorado BLM policy. See Decision at 5, 7. On this basis, Judge Sweitzer found that Shiner was not a "qualified" applicant under 43 C.F.R. ' 4130.1!2 (1994).

[1, 2] The law is well settled that implementation of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. ' ' 315, 315a to 315r (1994), is committed to the discretion of the Secretary of the Interior, through his duly authorized representatives in BLM. Yardley v. BLM, 123 IBLA 80, 89 (1992), and cases cited therein. By regulation, the Department has provided that an adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 C.F.R. Part 4100. 43 C.F.R. ' 4.478(b). In this manner, the Department has considerably narrowed the scope of review of BLM grazing decisions by an ALJ and by this Board. Eason v. BLM, 127 IBLA 259, 260 (1993).

The requirement that an individual hold a minimum 3!year lease in order to "control" land base property, and thus qualify for grazing use or a preference under 43 C.F.R. ' 4110.1(a), appears only in the Range

Administration Policy of BLM's Colorado State Office. It provides, in relevant part, with respect to base property qualifications:

To achieve resource objectives by promoting longer term range management through efficient and orderly administration, Colorado policy is to require a minimum three (3) year base property lease. A five (5) year minimum term is recommended. When control of base property is established through a lease, the expiration date of a Grazing Permit or Grazing Lease shall be the same as the expiration date of the base property lease, not to exceed a term of ten (10) years.

(Ex. 6, Attachment (emphasis added).) The Colorado policy thus defines, in a lease situation, what is necessary to constitute "control," as opposed to ownership, of base property, within the meaning of 43 C.F.R. ' 4110.1(a). It requires that a grazing permit or lease will only be issued to an applicant who leases base property on which the applicant holds the minimum of a 3!year lease to the property. The objective is plainly to ensure that a Federal grazing permit or lease is issued only to someone who demonstrates a substantial commitment to continued range management by virtue of an existing long!term lease interest in base property, somewhat comparable to ownership of such property.

We agree with Judge Sweitzer that the requirement that an applicant for grazing use or a preference hold land base property under a minimum 3!year lease, in order to demonstrate "control" of the property, within the meaning of 43 C.F.R. ' 4110.1(a), is "reasonable and consistent with the law." (Decision at 5.) It is intended to achieve a rational purpose and, to the extent that the applicable statute and regulations do not specify what constitutes an acceptable lease or level of control of contiguous lands, it is plainly not contrary to that law.

Section 15 of the Taylor Grazing Act provides the Secretary of the Interior with "discretion[ary]" authority to lease vacant, unappropriated, and unreserved public lands not properly included in a grazing district for grazing purposes, noting that, in so doing, "preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands." 43 U.S.C. ' 315m (1994) (emphasis added). The statute, thus, accords a preference to a "lessee[]," without specifying the duration or other terms and conditions of his lease. See The Corporation of the Great Southwest, 69 IBLA 333, 338 (1982).

In particular, 43 C.F.R. ' 4110.1(a) provides simply that, in order to qualify for grazing use on the public lands, and thus be awarded a grazing preference, an applicant "must own or control land * * * base property." See Rudnick v. BLM, 93 IBLA 89, 92, 95!96 (1986); Mark X. Trask, 32 IBLA 395, 397 (1977). Also, no requirement regarding the duration of a lease is found in 43 C.F.R. ' 4130.1!2 (1994), which set forth the primary criteria for allocating a preference between competing applicants. See Mark X. Trask, 32 IBLA at 398!99.

Admittedly, the statute and regulations support a conclusion that to qualify for grazing use or a preference, an individual may lease land under a 1-year lease. See The Corporation of the Great Southwest, 69 IBLA at 338. However, in Colorado, BLM has established a policy to require a 3-year lease. This policy is binding on BLM, when, as here, it is not contrary to any applicable law or regulation. (Decision at 415; Howard B. Keck, Jr., 124 IBLA 44, 55 (1992), aff'd Keck v. Hastey, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993); Texasgulf, Inc., 111 IBLA 267, 269-70 (1989).)

With respect to base property offered by Shiner, we are not persuaded by his argument on appeal that the 1993 lease, allegedly in effect at the time of BLM's March 1994 Final Decision, was actually, under the common law, for an indefinite term since, while it was for 1 year, it was subject to renewal at his option. See SOR at 9110, 12. We accept the fact that the common law provides that a lease for a specified term "coupled with an option to * * * renew the same lease for an additional period gives a lease effect as an original present demise for the full term for which it might be made inclusive." (SOR at 9110.) However, that is true only where the renewal of the lease is solely at the option of the lessee and enforceable against the lessor. See 51C C.J.S. Landlord & Tenant ' ' 54, 64, 65 (1968).

Such is not the case here, where the lease is subject to the agreement of the parties to the lease. See SOR at 12. Moreover, a copy of Shiner's 1994 lease (Ex. H), which was purportedly identical (with the exception of the rental and other financial terms) to the 1993 lease in effect at the time of issuance of BLM's March 1994 Final Decision, contains no "option to * * * renew." See Tr. 504106, 508. The legal doctrine advanced by Shiner is not applicable here. Indeed, we note that, even under Shiner's version of events, he did not hold a minimum 3-year lease at the time he applied for the grazing preference in January 1994, or when it was finally awarded to him by BLM in March 1994.

In a competitive situation it was incumbent on BLM to insure that the qualifying conditions were met by each of the applicants before proceeding to a comparative analysis of the ranking factors. In its reply to Mrs. Kayser-Meyring's answer, BLM stated that the rangeland management specialist knew from Shiner and a coworker that Shiner "had leased the contiguous Middleton property for years." (Reply at 3.) On this basis, Shiner was considered a qualified applicant without offering any supporting documentation to establish his control of leased property. While BLM complains that the issue of Appellant's qualifications was raised for the first time by Kay Kayser-Meyring on appeal, we believe that the issue of an applicant's qualifications could be challenged at any point in the process.

Indeed, since only qualified applicants are entitled to compete for the grazing use, where a question arises regarding an applicant's qualifications BLM has a responsibility to reexamine its initial determination, and where appropriate eliminate an unqualified applicant from the process.

Judge Sweitzer held that "BLM violated its own State-wide, three-year lease term policy without adequate justification when it awarded the grazing preference of 575 AUMs to Mr. Shiner." (Decision at 7.) The

Colorado Range Administration Policy "require[s]" that, in order to qualify for grazing use or a preference, an applicant hold his land base property under a minimum 3!year lease. Until this policy is amended, BLM offices in Colorado may not depart therefrom. (Decision at 7; see Atlantic Richfield Co., 112 IBLA 115, 127!28 (1989).) Thus, Judge Sweitzer was correct in concluding that the award was contrary to the Colorado policy and in overturning BLM's March 1994 Final Decision on that basis.

Having found that Judge Sweitzer properly determined that the award of the grazing preference to Shiner was improper, we find that the next qualified applicant should be awarded the grazing preference. Mrs. Kayser-Meyring met the mandatory qualifications set forth at 43 C.F.R. ' 4110.1, and further examination of the BLM matrix with respect to the factors considered show that she was competitive in each area. There being no qualified applicant better positioned than she who is a party to this appeal, Judge Sweitzer appropriately awarded the grazing preference to Kay Kayser-Meyring, as she is the only qualified applicant remaining with an interest in this matter.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the decision of Judge Sweitzer challenged herein is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge